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No. 89-383

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

LARRY RAY HANSON,
Petitioner,

vs.

PETER N. ARROWSMITH, M.D.; PETER N. ARROWSMITH, M.D., P.C.; AND ARROWSMITH EYE INSTITUTE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court committed reversible error by submitting this case to an eight person jury when Petitioner consented to an eight person jury prior to trial pursuant to Fed. R. Civ. P. 48 and Petitioner failed to object to an eight person jury when the case was submitted for deliberation?

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STATUTORY PROVISIONS INVOLVED

Petitioner has misquoted the current language of 28 U.S.C. § 2072 (Supp. 1989). The statute now provides as follows:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

The prior version of 28 U.S.C. § 2072, as quoted by Petitioner, was repealed in 1988 and replaced with the above provisions in the Judicial Improvements and Access to Justice Act, Pub. L. 100-702, Title IV, § 401(a), 102 Stat. 4648 (1988).

RULES INVOLVED

Rule 48 of the Federal Rules of Civil Procedure provides as follows:

> **Juries of Less Than Twelve - Majority Verdict.** The parties may stipulate that the jury shall consist of *any* number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

(Emphasis added).

Rule 10(c) of the Federal Rules of Appellate Procedure provides as follows:

> **(c) Statement on the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

Rule 10(e) of the Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> **(e) Correction or Modification of the Record.** *If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth.* If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or *the district court either before or after the record is transmitted to the court of appeals,* or the court of appeals, on proper suggestion or of its own initiative, *may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted.*

(Emphasis added).

STATEMENT OF THE CASE

The jury trial in this medical malpractice case began on January 13, 1986, in the United States District Court for the Middle District of Tennessee. On the first morning of trial Judge John Nixon summoned counsel to chambers to discuss and clarify various trial procedures including *voir dire,* challenges of jurors and the numerical composition of the jury. The conference was not transcribed, but the substance of the discussion in chambers was later certified by the trial judge and made a part of the record in accordance with Fed. R. App. P. 10(c) and (e).

The judge and all counsel discussed and agreed upon the jury selection process. Judge Nixon explained that twenty jurors would be brought into the courtroom. The court would allow six peremptory challenges for plaintiffs and six for defendants. After the parties exercised all twelve peremptory challenges, a jury of eight would be sworn and seated with *no designation* of alternate jurors. At the end of trial, *if both sides agreed,* then each side would dismiss one juror, and the remaining jury of six would decide the case. If both sides did not agree to excuse two jurors, then the case would be submitted to the full jury of eight.

All counsel were present during the conference in chambers, and no one objected to the procedure proposed by the trial court. To the contrary, all counsel expressed their understanding of and agreement with the method of jury selection and the number of jurors who would hear the case.

When the trial began, Judge Nixon followed the exact procedure which had been discussed and agreed upon in

chambers. Petitioner's counsel did not object to the trial court seating eight regular jurors with *no* alternate jurors at that time or at any other time during the four day trial.

Following closing arguments and the jury charge, the case was submitted to the eight regular jurors. *After the jury retired and began its deliberations,* Petitioner's counsel asked about reducing the size of the jury. The entire colloquy between court and counsel on this issue (which occurred after the jury retired) was as follows:

> PETITIONER'S COUNSEL: Excuse me, Your Honor, are we not going to strike down to six?
>
> TRIAL JUDGE: You want to strike to six or go to all eight?
>
> RESPONDENTS' COUNSEL: I prefer to let it go to all eight.
>
> PETITIONER'S COUNSEL: I want to strike to six.
>
> TRIAL JUDGE: It's up to the Court. I'm going to let it go to all eight.

Petitioner's counsel never objected. Petitioner's counsel never voiced any complaint that the trial court was deviating from the procedure that had been agreed upon prior to trial. Instead—consistent with the procedure discussed in chambers—Petitioner's counsel merely expressed his desire to strike down to six jurors and then sat mute when, in the absence of an agreement between the parties, the trial judge allowed all eight regular jurors to continue their deliberations.

The eight member jury returned a *unanimous* verdict in favor of Respondents. The trial court entered judgment on the verdict on January 22, 1986.

On February 3, 1986, Petitioner timely filed a motion for new trial which, *inter alia*, contained the conclusory assertion that the trial court erred by submitting the case to an eight person jury. Petitioner filed no brief in support of the motion for new trial and did not indicate why the use of an eight person jury pursuant to agreement might constitute error warranting a new trial. In opposition to the motion for new trial, Respondents filed a memorandum of law that fully recounted the pretrial conference in which all counsel and the trial court had agreed upon the procedure which produced an eight person jury. On September 19, 1986, the trial court denied Petitioner's motion for new trial.

Ten days later Petitioner filed a motion to reconsider the denial of new trial. For the *first* time in the proceedings—almost eight months *after* the original motion for new trial—Petitioner's trial counsel asserted there had been no agreement regarding the procedure which led to an eight person jury. While the motion to reconsider was pending, Petitioner filed a Notice of Appeal on October 8, 1986, thereby divesting the trial court of jurisdiction. The case was docketed in the Sixth Circuit Court of Appeals on October 15, 1986.

Petitioner then discharged his trial counsel, and on November 14, 1986, Steven A. Riley filed a Notice of Appearance as substitute counsel. Petitioner's new counsel also moved the trial court to stay all proceedings even though jurisdiction over the case was vested in the Court of Appeals. Three days later, on November 17, 1986, Petitioner's new counsel sent a letter to the Clerk for the Sixth Circuit Court of Appeals in which he argued against his own client's Notice of Appeal and

further argued that Petitioner's appeal should be dismissed and the case remanded to the trial court. By letter dated December 30, 1986, the Clerk for the Sixth Circuit advised that the Court of Appeals would not rule on Petitioner's challenge to his own Notice of Appeal and that the appeal would proceed as previously scheduled.

On January 23, 1987, Respondents moved the district court, pursuant to Rule 10, Fed. R. App. P., to supplement the record with a narrative statement describing the pretrial conference in which the court and all counsel had agreed upon the jury selection process. After reviewing affidavits from all trial counsel for both Petitioner and Respondents, Judge Nixon supplemented the trial record with the following Statement on the Evidence or Proceedings:

> On the morning of January 13, 1986, all counsel were summoned to chambers where a number of preliminary matters were discussed, including the procedure which would be followed in selecting a jury to try this case. The jury selection process which the court described to all counsel was as follows: twenty jurors would be brought to the courtroom and placed in the jury box and in a row of seats in front of the box. During voir dire, plaintiffs would be allowed six peremptory challenges and the defendants would be allowed six peremptory challenges between them. After all twelve challenges had been exercised *a jury of eight persons would be sworn and seated and no alternate jurors would be specifically designated.* The case would then be tried to all eight jurors. At the end of

> the trial *if both sides agreed* to excuse two of the jurors *then each side would select one juror who would be dismissed* and the remaining jury of six persons would retire to deliberate. *If both sides did not agree* to excuse two jurors at the end of the trial, *then the case would be submitted to a jury of eight.*
>
> All counsel were present when this procedure was described and discussed and no one objected to it. *All counsel* had the opportunity to ask the court questions about the procedure and *expressed their understanding and agreement with the manner of jury selection and the number of jurors who would hear the case.* This procedure was then followed during voir dire, throughout the trial of the case, and when the evidence was concluded and the case submitted to the jury for its consideration.

(Emphasis added). The district court judge expressly certified that the foregoing narrative statement accurately and truthfully set forth the in-chambers discussion of the procedure which produced the eight person jury.

On appeal, the Sixth Circuit rejected Petitioner's assertion that the eight person jury violated Fed. R. Civ. P. 47(b) and Local Rule 12(j). The Sixth Circuit based its decision on Fed. R. Civ. P. 48 and the pretrial *stipulation* of the parties regarding the jury selection procedures.

> We conclude that Fed. R. Civ. P. 48 does not preclude a stipulation such as that found by the dis-

trict court.[4] Likewise, we find that the local rule does not preclude waiver by a stipulation entered into pursuant to Rule 48.

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[4]In reaching this decision we reject plaintiff's overly restrictive reading of Fed. R. App. P. 10 and find the district court's statement on the evidence or proceedings is properly before us pursuant to Fed. R. App. P. 10(e).

Hanson v. Parkside Surgery Center, 872 F.2d 745, 748 (6th Cir. 1989) (citations omitted).

In *dicta* the Sixth Circuit went on to note that even *if* there had been technical violations of Fed. R. Civ. P. 47(b) and Local Rule 12(j), the violations would be reviewed under the harmless error standard. Relying on this Court's opinions in *Ballew v. Georgia,* 435 U.S. 223 (1978), *Colgrove v. Battin,* 413 U.S. 149 (1973), and *Williams v. Florida,* 399 U.S. 78 (1970), the Sixth Circuit concluded "that no right was violated and therefore that no reversible error occurred despite the departure from authorized jury size." *Hanson,* 872 F.2d at 750.

Petitioner filed a Petition for Rehearing *En Banc.* When no judge of the Sixth Circuit requested a vote for rehearing *en banc,* the petition was denied by Order entered on June 6, 1989.

REASONS FOR DENYING WRIT

Petitioner asks this Court to review an issue that is not presented by the record. The record shows not only that Petitioner failed to object to the eight person jury, but also that he agreed to the eight person venire before the jury was impanelled. There were no alternate jurors in the deliberations, and Fed. R. Civ. P. 47(b) did not come into play.[1] Moreover, even if the record did raise the Rule 47(b) issue advanced by Petitioner, there is no reason for this Court to reconsider the well-established principles regarding the effect of jury size on the right to trial by jury as set forth in *Ballew v. Georgia*, 435 U.S. 223 (1978), *Colgrove v. Battin*, 413 U.S. 149 (1973), and *Williams v. Florida*, 399 U.S. 78 (1970).

The principal reason for denying *certiorari* is that the record squarely contradicts the assertions on which Petitioner bases his argument. There were no alternate jurors, and Petitioner's attorneys did agree to the procedure which produced an eight person jury.[2] Since *no* alternate jurors participated in the jury deliberations, the reported cases cited by Petitioner, including the Fourth Circuit's decision in *Kuykendall v. Southern Rail-*

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1. Petitioner has never identified the so-called "alternate" or "extra" jurors, because *no* alternate jurors were ever designated. The case was decided by eight "regular" jurors, and this Court should not be misled by Petitioner's repeated references to non-existent and unidentifiable "alternate" jurors.

2. The district court's Statement on the Evidence or Proceedings stands unchallenged as the record on appeal regarding the pretrial stipulation on jury selection procedures. Petitioner does not ask this Court to review the procedure by which the district court supplemented the record. Nor does Petitioner challenge the Sixth Circuit's finding that the record was properly supplemented pursuant to Fed. R. App. P. 10.

way Co., 652 F.2d 391 (4th Cir. 1981), are simply inapplicable. Moreover, the circuit courts of appeal that have considered the issue are unanimous in holding that a party cannot claim error with regard to a jury selection procedure discussed with and agreed to by his own trial counsel. *United States v. Viserto*, 596 F.2d 531, 539-40 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979); *Seese v. Volkswagenwerk, A.G.*, 648 F.2d 833, 847-49 (3rd Cir.), *cert. denied*, 454 U.S. 867 (1981); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 514-15 (4th Cir. 1985); *Latex Supply Co. v. Freuhauf Trailer*, 444 F.2d 1366, 1367 (5th Cir.), *cert. denied*, 404 U.S. 942 (1971); *United States v. Davis*, 608 F.2d 698 (6th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980).

Petitioner's plea to this Court is premised not only on a mischaracterization of the record but also on a mischaracterization of the ruling below by the Sixth Circuit Court of Appeals. The Sixth Circuit did not sanction violations of Rule 47(b); nor did it authorize the presence of alternate jurors in jury deliberations; nor did it apply the harmless error standard to a purported violation of the Seventh Amendment right to a trial by jury.[3] The *only* holding by the Sixth Circuit—which Petitioner conveniently never mentions in his Petition—was that the record supported the district court's finding

3. It should be noted that Petitioner did not even mention the Seventh Amendment in the district court nor in his original arguments to the Sixth Circuit. The first time that Petitioner even suggested that his Seventh Amendment rights might be affected was in his Petition for Rehearing *En Banc* after the Sixth Circuit had already issued its opinion. In any event, this Court has already rejected Petitioner's argument that the Seventh Amendment guarantees a particular number of jurors and the argument that 28 U.S.C. § 2072 supposedly prohibited any deviation from the number of jurors used under the common law. *Colgrove v. Battin*, 413 U.S. 149, 158-63 (1973).

of a Rule 48 stipulation to the jury selection procedures that produced an eight person jury. *Hanson*, 872 F.2d at 748-49. Indeed, Petitioner identifies *no* issue and presents *no* argument that calls into question the *actual* holding of the Sixth Circuit. This Court should not grant *certiorari* to review fictitious rulings on a fictitious record. The actual record from the trial court and the actual ruling by the Sixth Circuit do not warrant review.

Even the *dicta* of the Sixth Circuit—which Petitioner misrepresents as the holding—does not merit the attention of this Court. Petitioner's arguments are directed at the following observation of the Sixth Circuit:

> Moreover, *assuming* that Rule 47(b) and that Local Rule 12(j) may have been violated, we still believe such violations are subject to the application of the harmless error standard of Fed. R. Civ. P. 61. *Cf. United States v. Levesque*, 681 F.2d 75, 80 (1st Cir. 1982) (violation of Fed. R. Crim. P. 24 warrants reversal only where irregularity affects substantial rights).

Hanson, 872 F.2d at 749 (emphasis added). The Sixth Circuit's *dicta* is, of course, consistent with this Court's conclusion that the mere size of a jury does not impinge on any substantial right of a party so long as the jury is "large enough to facilitate group-deliberation combined with a likelihood of obtaining a representative cross section of the community." *Colgrove v. Battin*, 413 U.S. 149, 160 n.16 (1973).

In *Colgrove* the Petitioner challenged a local rule of court that prescribed a jury of six instead of twelve for trial of all civil cases. Relying heavily on its prior

decision in *Williams v. Florida*, 399 U.S. 78 (1970), this Court stated:

> [T]he question comes down to whether jury reliability is a function of jury size. In *Williams* we rejected the notion that "the reliability of the jury as a factfinder . . . [is] a function of its size," and nothing has been suggested to lead us to alter that conclusion.

Colgrove, 413 U.S. at 157 (citation omitted).

Petitioner is actually claiming error on the anomalous ground that he received *more* of a "representative cross section" and *more* of an opportunity to avoid defeat than he deserved under the rules. *One* dissenting juror would have prevented a victory for Respondents, and Petitioner had a higher probability of one dissenting view with a group of eight than with a group of six.[4] *See*, Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 717-18.

If this case involved outside influences on the jury's deliberations, or if this case involved unqualified jurors, Petitioner might legitimately claim a violation of substantial rights. Petitioner, however, does not contend that the jury was manipulated or wrongfully influenced in any way. Nor does he claim that *any* two of the eight jurors were incompetent or unqualified. Faced with a unanimous verdict for Respondents, Petitioner simply

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4. Petitioner claims he was prejudiced because he "faced the burden of convincing eight, not six, people." Petition for Writ of Certiorari at 12 n.3. A litigant who cannot convince one juror has little reason to complain about the extra "burden" of convincing eight rather than six.

asserts a baseless preference for six jurors rather than eight. Petitioner never explains why a jury of eight should be *per se* reversible error when juries of six or juries of twelve are conclusively valid.

In fact, given the historical ideal of a twelve person jury, it is hard to find any reasoned basis for Petitioner's adamant insistence on a panel of six instead of eight. As Justice Marshall observed, "All one can say is that a jury of six functions less like a jury of 12 than would a jury of, say eight . . ." *Colgrove*, 413 U.S. at 180-81 (Marshall, J., dissenting). Moreover, the exhaustive empirical studies reviewed by this Court in *Ballew v. Georgia*, 435 U.S. 223, 231-40 (1978), support the conclusions that a jury of eight would, if anything, be more reliable, more representative, and more likely to foster effective deliberation than a jury of six. *See also, Brown v. Louisiana*, 447 U.S. 323, 332 (1980); *Colgrove*, 413 U.S. at 158-60.

In summary, the submission of this case to an eight person jury did not violate or even implicate any substantial rights of Petitioner. To the contrary, Petitioner's claim was unanimously rejected by a more representative and more reliable jury than he was entitled to under the law. Most importantly, however, the record in this case simply does not raise the issue presented by Petitioner. There were no alternate jurors in the jury deliberations, and Petitioner agreed to the procedure that produced the eight person jury. The Sixth Circuit did not authorize deviations from Fed. R. Civ. P. 47(b); it merely enforced the Petitioner's stipulation under Fed. R. Civ. P. 48.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Noel F. Stahl, a member of the Bar of the Supreme Court of the United States and counsel of record for Peter N. Arrowsmith, M.D., Peter N. Arrowsmith, M.D., P.C., and Arrowsmith Eye Institute, Respondents herein, hereby certify that on this 28th day of September, 1989, the requisite number of copies of the foregoing brief were served upon Steven A. Riley, BASS, BERRY & SIMS, 2700 First American Center, Nashville, Tennessee 37238, attorneys for Petitioner, by United States mail, postage prepaid.

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